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[*House v. Tennessee Valley Authority*](#), 92-ERA-9 (ALJ Oct. 15, 1992)

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U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

DATE: October 15, 1992

CASE NO: 92-ERA-9

In the Matter of

JAMES E. HOUSE
Complainant

v.

TENNESSEE VALLEY AUTHORITY
Respondent

APPEARANCES:

DOROTHY STULBERG, Esquire
For the Complainant

BRENT R. MARQUAND, Esquire
For the Respondent

BEFORE: ROBERT L. HILLYARD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises from a complaint filed by the Complainant, James E. House [hereinafter House or Complainant], against the Respondent, Tennessee Valley Authority [hereinafter

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TVA or Respondent], pursuant to Section 210 of the Energy Reorganization Act of 1974 [hereinafter ERA or the Act] (42 U.S.C. Section 5851) and the implementing regulations (29 C.F.R. Part 24).

Complainant, a TVA employee at Watts Bar Nuclear Plant (Watts Bar), initiated this proceeding by a complaint dated May 31, 1991 claiming that TVA had discriminated against him in violation of Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. Section 5851 (1988). The Complainant alleges that the Respondent maintained a continuing pattern of harassment of him due to his filing of a safety complaint with 1 the Nuclear Regulatory Commission (hereinafter NRC) (RX 1; JX 1).¹

Initial efforts by the Wage and Hour Division, Employment Standards Administration, to conciliate the matter did not result in a mutually agreeable settlement. The Wage and Hour Division then conducted a fact finding investigation of the matters raised by the complaint and concluded, in an October 29, 1991 letter, that "discrimination was (not) a factor in the actions comprising the complaints." The Complainant appealed this decision and the matter was referred to the Office of Administrative Law Judges for formal hearing.

A formal hearing in this case was held in Knoxville, Tennessee, on March 19, 1992. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder. The findings and conclusions which follow are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. ISSUES

The issues presented for resolution are:

1. Whether the complaint was timely filed.
2. Whether the Complainant was engaged in a protected activity.

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3. Whether the Complainant was discriminated against in retaliation for filing a safety complaint with the NRC.

II. FINDINGS OF FACT

1. Respondent TVA is a Federal agency created by the TVA Act of 1933, 16 U.S.C. Sections 831-831dd (1988). TVA has five licensed nuclear units, two at Sequoyah Nuclear Plant (Sequoyah) and three at Browns Ferry Nuclear Plant. TVA also has four nuclear units under construction, two at Watts Bar Nuclear Plant (Watts Bar) and two at Bellefonte Nuclear Plant (JX 1, stip. 1).

2. Complainant is a steamfitter employed by TVA on an annual basis and assigned to the Mechanical Maintenance organization at Watts Bar. On October 5, 1990, he became locked in the Post Accident Sampling Room (PASR) for approximately six and one-half hours due to a faulty door. As a result, Mr. House, who had a history of psychological problems, had a claustrophobic reaction and panic attacks for which he was held off work by his private psychiatrist and TVA from October 15, 1990, through March 18, 1991. TVA withdrew the medical aspect of his security clearance, and ultimately his security clearance, and his approval to return to work. TVA also disagreed with Mr. House's claim for workers' compensation under the Federal Employees' Compensation Act (FECA). Mr. House filed an ERA claim, No. 91-ERA-42, over those matters. That case was tried before Administrative Law Judge Ralph A. Romano on October 30-31, 1991, and is pending a decision. The issues in that case are not before the Court here (JX 1 stip. 3; Tr. 192).

3. Mr. House has a background of psychological problems including a "bipolar condition" that were aggravated by the entrapment in the room (JX 2 at 20). As a result of the lock-in incident, the Complainant suffered emotional distress or trauma and remained off work for approximately five months (JX 1).

4. On March 6, 1991, Complainant's private psychiatrist, Glenn R. Peterson, released him to return to work on March 18, 1991, initially for four hours per day and full time on April 1, 1991, with the restriction that he was to be limited in going into severely confined locations," such as:

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1. 90' valve pit in the intake pumping station.
2. Post accident sample rooms.
3. Heat exchanger room.
4. Bit tank room in the pipe chase area and any other very small confined space that Mr. House finds extremely frightening.

The restrictions were reviewed and approved by TVA's Medical Services and TVA management and Mr. House was assigned, upon his review of the assignment and agreement to try the proposed work location, to work in the rigging room (referred to by Mr. House as the "rigging cage"). The rigging room is located in Watts Bar's machine shop where equipment and tools are maintained, and his primary duty was to take care of the tools and equipment issued to craft personnel. Complainant began working four hours per day for the first two weeks and then full time thereafter (JX 1, stip. 4).

5. In the rigging room job, Complainant was responsible for signing out equipment, but was not required to stay in the room at all times. In fact, his supervisor instructed him to spend time in the break room adjacent to the rigging room when he was not checking the tools out. Complainant testified that he did spend time in the break area drinking coffee and talking to co-workers (Tr. 79-81).

6. By letter dated March 8, 1991, TVA notified all employees of the new policy requiring security clearances as a condition of employment after May 20, 1991 (RX 11). The Complainant's clearance had previously been revoked due to his psychological problems. His former position in the mechanical maintenance department required this clearance (Tr. 166). In order to obtain the required clearance, the Complainant and any other employee who was without a security clearance was required to take an Minnesota Multifaceted Personality Inventory (MMPI) test, have a complete medical examination, complete a mental health questionnaire and, if appropriate, be interviewed by a TVA psychologist (RX 11).

7. On March 18, 1991, Complainant took the Minnesota Multifaceted Personality Inventory (MMPI) in connection with his return to work and as part of the evaluative process to determine whether his S-1 medical clearance could be restored. That clearance had been withdrawn shortly after the October 5, 1990, incident. The March 18, 1991, MMPI was administered by TVA's Psychological Services in Chattanooga, Tennessee. Although Psychological

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Services determined that Mr. House's medical condition did not warrant the restoration of his S-1 clearance, he was approved to return to work under the restrictions imposed by his private doctor (JX 1, stip. 11).

8. Management at Watts Bar implemented a new policy in the spring of 1991, requiring each employee at Watts Bar to have an NPA clearance as a condition of continued employment at Watts Bar. Since the S-1 medical clearance is an essential and required element of the NPA, those employees who did not possess S-1 medical clearances had to undergo an evaluative process, including taking the MMPI, to obtain their S-1 and NPA clearances under the new TVA policy. The evaluation process for the S-1 and NPA clearances are described in RX-11. Accordingly, on April 26, 1991, Mr. House was notified that he was scheduled to take the MMPI on May 3, 1991. This MMPI was administered by TVA's Medical Services at Watts Bar, not TVA's Psychological Services in Chattanooga. All Watts Bar employees who did not possess S-1 medical and NPA clearances were treated the same in administering the MMPI. Watts Bar Medical Services obtained a printout of all Watts Bar employees to determine who did not possess S-1 and NPA clearances. Those employees who did not possess the S-1 and NPA clearances were scheduled to take the MMPI (JX 1, stip. 12).

9. A few weeks after his new assignment, Mr. House met with Mr. Swanson, his supervisor, about his assignment in the rigging room. Mr. House asked Mr. Swanson when he could return to his regular steamfitter job in the plant. Mr. Swanson explained that TVA management could not change his medical restrictions, and that TVA management could not reassign him to his regular job until his medical restrictions were modified or removed by his private doctor and TVA's Medical Services and until he again qualified for a NPA clearance (JX 1, stip. 6).

10. The Health Services department of TVA maintained oversight of the Complainant's condition in order to "ensure that he was receiving the proper treatment, that he was following his treatment plan according to his doctor's recommendation and that his progress was satisfactory to maintain this clearance" (Tr. 222-223). The lead psychologist at TVA's Health Services, Dr. Thomas Sajwaj, met with the Complainant on April 12, 1991 to review his progress and to see if the Complainant was on track to get his clearance reinstated (Tr. 257). Mr. House told Dr. Sajwaj that he was unhappy with his position in the rigging room because it was not productive and that his personal psychiatrist, Dr. Peterson, had told him that the rigging room job was adversely affecting his progress in therapy (Tr. 227) - Complainant

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requested Dr. Sajwaj's assistance in changing his work assignment and location. Dr. Sajwaj agreed to consult with Mr. House's private psychiatrist about his problems. The assertion in Mr. House's complaint (at 2) that this meeting took place on May 7, 1991, is incorrect. The meeting actually took place on April 12, 1991, as shown by Mr. House's own notes and his statement to the Wage and Hour Division during its investigation of his complaint (JX 1, stip. 7). At that time, Dr. Sajwaj first requested the Complainant to sign a release to obtain information from Dr. Peterson (Tr. 227-228).

11. Dr. Sajwaj testified that he could not discern any problem with the rigging room job in relation to Complainant's lock-in accident as the two rooms were markedly dissimilar. He testified that he needed to consult with Dr. Peterson, the Complainant's psychiatrist, and obtain his medical information (Tr. 230-31). Dr. Sajwaj requested TVA's Medical Services to obtain a signed medical release from Mr. House because Dr. Sajwaj felt he needed to consult with and/or obtain pertinent medical records from complainant's private psychiatrist in connection with complainant's request for help in getting his work assignment in the room changed (JX 1, stip. 13).

12. Complainant refused to sign a medical release. His previous counsel advised him not to execute the medical release because, according to that lawyer, the document would release TVA from liability for the October 5 incident (JX 1, stip. 8; Tr. 229). Dr. Sajwaj ultimately scheduled a meeting for May 8, 1991 with the Complainant to discuss his reservations about signing the medical release (Tr. 236). In the end, four or five requests were made of the Complainant to sign the release and in one incident a foreman accompanied Complainant to the medical office and called him "old craze" in a derogatory fashion (Tr. 100-101).

13. Mr. House's complaint claims that Dr. Sajwaj subjected him to "verbal and continual harassment" during their meeting when Dr. Sajwaj purportedly accused Mr. House "of having met every psychologist in the valley." As discussed above, Mr. House and Dr. Sajwaj met on April 12, 1991. During their meeting, Mr. House and Dr. Sajwaj discussed the difficulty Mr. House was having with his work assignment in the rigging room (JX 1, stip. 9).

14. On April 15-17, 1991, Mr. House and six other TVA employees took the 3-day Maintenance Systems Retraining class, which involved a review of all major systems at Watts Bar. The course instructor was Anthony F. Bussing (JX 1, stip. 10).

15. The Maintenance Systems Retraining class was a refresher course for maintenance people to provide an overview of the operation of the nuclear plant (Tr. 114, 206-207). Complainant attended the course and found the material very difficult. However, he needed to take the class and pass the test in order to maintain his certification. Complainant talked to the instructor, Anthony Bussing, and told him that he "might be a little slow" (Tr. 209-210). During the class, the instructor repeatedly asked questions of all the students and would periodically ask students, including the Complainant, if they understood him (Tr. 116-117). Another student in the class, Anson Christian, testified that he didn't feel that the Complainant had been singled out in any way, but that the Complainant had stated that he felt harassed by the instructor (Tr. 122). The Complainant did not talk to the instructor or relay his feelings to the instructor who testified that he had no knowledge of the complaint filed with the NRC (Tr. 205).

16. The Complainant left his job on May 7, 1991 due to an episode of anxiety and has not returned (Tr. 42). The Complainant then filed a complaint on May 31, 1991 alleging that the TVA had discriminated against him due to his report of a safety violation to the NRC (RX 1). The complaint alleges a continued pattern of harassment demonstrated by the repeated requests for the medical release, the required MMPI retesting, his assignment to the rigging room position and the harassment by the training class instructor.

17. The question of whether the Respondent is an employer subject to the Act has not been contested and I do find that TVA is subject to the Act.

III. CONCLUSIONS OF LAW

The Energy Reorganization Act prohibits employers subject to its provisions from discriminating "in practically any job-related fashion against an employee because the employee participated in NRC investigatory or enforcement proceedings." *Deford v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1981). The statute has necessarily been interpreted broadly "to prevent employers from inhibiting disclosure of particular facts or types of information." *Id.* "The statute is aimed at preventing intimidation and

whether the scope of such activity happens to be narrow or broad in a particular case is of no import." *Id.* The Act specifically provides protection to an employee who:

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under this chapter ... or a proceeding for the administration or enforcement of any requirement imposed under this chapter; <P
 - (2) testified or is about to testify in any such proceeding; or
 - (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of this chapter ...
- 42 U.S.C. Section 5851(a).

A whistleblower complaint under the ERA is modeled after other discriminatory actions and involves an initial *prima facie* showing by the complainant of discriminatory behavior by the employer. *McCuiston v. T.V.A.*, 89-ERA-6 (Sec'y Nov. 13, 1991); *Darty v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983); *see, Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The *prima facie* showing must be sufficient to permit an inference of illegal discrimination, that the "protected activity was the likely reason for the adverse action." *Darty*, slip op at 8. The employer may then rebut the inference with a showing of a legitimate nondiscriminatory reason for the actions. *Burdine* at 248. The ultimate burden of persuasion remains with the complainant. Upon the employer's rebuttal, the complainant must come forward with further evidence proving that the employer's explanation is pretextual in nature or unworthy of credence. *Burdine* at 246.

The basic elements of a *prima facie* case of illegal discrimination under the ERA involves a showing through direct or circumstantial evidence that:

1. the complainant engaged in protected activity;
2. the complainant was subjected to adverse action from the employer; and

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3. the employer was aware of the protected activity when it took the adverse action. *McCuiston, supra*.

In addition, there must be evidence presented that raises an inference of causation that the protected activity motivated the employer's actions. *Id*.

The Complainant alleges that TVA subjected him to a series of adverse conditions that either individually demonstrated discriminatory behavior or collectively formed a hostile work environment due to his protected activity of filing a safety complaint with the NRC. A hostile work environment claim has been recognized under the ERA in one circuit which noted the analogous circumstances of harassment based on sex or race to one of discrimination based on protected activity. *English v. Whitfield*, 858 F.2d 957 (4th. Cir. 1988). As the *English* court noted, there can be no distinction between the impact of sexual or racial harassment and that when a "supervisor harasses a subordinate because of that subordinate's protected whistleblower conduct." *Id* at 964. Essentially, the employer's actions in both cases amount to "retaliatory discrimination against an employee with respect to his terms, conditions, or privileges of employment." " *Id.* (quoting, 42 U.S.C. Section 5851(a)).

The hostile work environment claim, however, is different procedurally and requires the claimant to demonstrate conditions "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). A separate *prima facie* review is necessary for hostile work environment claims which, in the sexual harassment arena, involve proof of the following five elements:

1. the employee belongs to a protected class;
2. the employee was subject to unwelcome harassment;
3. the harassment was based upon sex;
4. the harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile or

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offensive work environment that affected seriously the psychological wellbeing of the plaintiff;

5. the existence of respondeat superior liability.

Rabidue v. Osceola Refining Co., 805 F.2d 611, 619-20 (6th Cir. 1986); *see, Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982)(cited with approval in *Meritor Savings Bank, supra*.) The above criteria are adaptable to a section 210 ERA action by amending the inquiry to harassment based upon a claimant's "protected activity" rather than sex or race. Moreover, as the *English* court noted the language of Section 210 mirrors the prohibition against discrimination in the workplace under Title VII. *English v. Whitfield, supra* at 964.

The question arises how to utilize this test in the context of an ERA action with its own established *prima facie* inquiry. The Sixth Circuit in *Rabidue* indicated that the traditional Title VII *Burdine* burden-shifting analysis is "not readily adaptable to developing the proofs and defenses" in this type of action. Instead, the court did recommend an apparent elimination of the bursting presumptions available in the *McDonnell-Douglas/Burdine* analysis and the use of the normal "practice of placing the burden of proof by a preponderance of the evidence upon the claimant followed by a proffer of defense and an opportunity for a plaintiff's rebuttal." *Rabidue, supra* at 621.

It appears that the Complainant's allegations of a hostile environment relates to the adverse consequences analysis in the *prima facie* showing of discriminatory behavior under the ERA. it would be logical then, to apply the Sixth Circuit's criteria to this segment of the *prima facie* inquiry, and, proceed with the balance of the *Burdine* analysis as the overall framework. The Complainant here would have to prove a hostile environment under the *Rabidue* model as the second element of the *prima facie* showing of discrimination, the adverse action, under the Section 210 analysis. Then, the Respondent would have the opportunity to rebut the *prima facie* showing and the Complainant must respond with evidence that the Respondent's explanation is pretextual or unworthy of credence. *See, Burdine*.

Protected Activity

The Sixth Circuit stated in *Deford v. Secy of Labor*, 700 F.2d 281 (6th. Cir. 1983), "the need for broad construction of the statutory purpose (of the ERA) can well be characterized as necessary to prevent the investigating agencies' channels of information from being dried up by employer intimidation." The Secretary and the courts have gone so far as to extend coverage to internal complaints of safety violations as well as to governmental agencies. *See, Mackowiak v. Univ. Nuclear Systems*, 735 F.2d 1159 (9th. Cir. 1984); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th. Cir. 1985). Mr. House filed a complaint with the NRC as a result of being locked in the PASR for over six hours. He notified Bob Wallace, his union job steward, Jeff Swanson, the third in command over pipefitters and his general foreman, Mr. Edwards, about the filing of the complaint. Mr. House also filed an internal complaint within TVA with Employee Concerns (Tr. 19-21). I find that by filing these complaints concerning a safety violation at TVA, Complainant was engaged in activity protected under the provisions of Section 210.

Alleged Harassment

The Complainant alleges that he met a series of adverse consequences that were related to his filing a complaint about the safety problems with the door in the post accident sampling room. These adverse consequences or alleged continuing acts of harassment or discrimination are contained in the letter of May 31, 1991 from Complainant's attorney, at that time, to Assistant District Director of the Wage and Hour Division of the DOL (ALJX 1). Specifically, he alleges that he was required to take a second MMPI test when he had just taken one three to four weeks earlier; verbal and continual harassment by Dr. Sagway (Sajwaj) on May 7, 1991; he was required to work in a confined space; intimidation and harassed by TVA medical personnel; and harassing conduct by the instructor in a training course.

Assignment to Rigging Room

Complainant objects to his placement in the rigging room as discriminatory treatment. However, he agreed to the placement in this position without objection and it was one of the few areas he could work without the necessary security clearance (Tr. 166). In addition, the Complainant testified that he spent little time actually in the room, but, rather sat outside or in the break area (Tr. 79-81) The complainant's foreman, Dennis Edwards, testified that the Complainant had not stated any dissatisfaction with the position or indicated that he "was nervous about working in the rigging room (Tr. 199). It appears from all the evidence

that TVA attempted to work with the Complainant to allow him to return to work and reacclimate himself to the environment sufficiently to regain his security clearance and his former position (Tr. 165). Accordingly, I find that the Complainant's assignment to the rigging room upon his return to work was not an adverse action in violation of the Act.

Maintenance Systems Retraining Course

The Complainant alleges that his treatment during the three day Maintenance Systems Retraining course by Anthony Bussing was discriminatory basically because he had not been "reasonably accommodated" by informing the instructor of his emotional condition. However, the testimony in the record demonstrates that the Complainant was treated similarly as others in the class and Mr. Bussing showed no animus to anyone in the training sessions (Tr. 119; 208). Mr. Bussing apparently utilized a socratic-type teaching method but was not harassing in his approach and inquired if the participants were understanding the material (Tr. 116-117, 121-122). Additionally, the failure to "reasonably accommodate" a disabled person is a claim under the Handicapped Act, not under the ERA. Complainant's allegations of a failure to adequately accommodate his emotional disability are not cognizable or even reasonable here. I find that the actions of Anthony Bussing in the training seminar of April, 1991 were not adverse actions in violation of the Act.

MMPI Exam

The Complainant was required to take a second MMPI examination on May 3, 1991 which he claims was pointless and thereby discriminatory in nature. This test was one of the procedures for obtaining the necessary security clearance that the Complainant needed in order to maintain his position with TVA (RX 11, Tr. 86, 240). He had previously taken the test in March, 1991 when he returned to work. Dr. Sajwaj testified that it was possible that there could have been sufficient improvement in Complainant's condition for him to pass the exam and regain his security clearance (Tr. 241-242). The effective date of the security clearance requirement was May 20, 1991 (RX 11). Thus, little time remained for Complainant to obtain this employment requirement. Although he now complains that having to take the test was troublesome to him, there is no evidence that the Complainant was treated in a disparate manner or with any animus

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relating to his filing of a complaint (JX 1; RX 11; Tr. 29-30). I find that this incident is not an adverse action in violation of the Act.

Alleged Mistreatment by Medical Staff

The Complainant alleges that the repeated requests for a medical release from the Health Services Department and circumstances surrounding those requests amounted to

harassment and discriminatory treatment under the Act. Dr. Sajwaj testified that he felt it was necessary to consult with Dr. Peterson, complainant's personal psychiatrist, because in his meeting of April 12, 1991, the Complainant had indicated that Dr. Peterson felt that the rigging room position was detrimental to his therapy (Tr. 227). Dr. Sajwaj did not have a valid release on file that would permit his contact with Dr. Peterson (Tr. 234). In his meeting with the Complainant, Dr. Sajwaj told him that he would look into the situation. He subsequently examined the Complainant's working area and found the area dissimilar to the room where the lock-in accident occurred and could not understand why the Complainant was being detrimentally affected by this position (Tr. 231).

The Complainant orally agreed to Dr. Sajwaj's contact with his personal physician but refused to sign the medical release form on the advice of his attorney (Tr. 40). Subsequently, he claimed that the form should have been altered in some fashion without explanation as to what he felt was objectionable or was in some manner prejudicial to him. Dr. Sajwaj, in fact, scheduled a meeting with the Complainant for May 8, 1991 to discuss the problems in obtaining the signed release, but the Complainant left TVA on May 7, 1991 and did not return. Given these circumstances, I do not find evidence that Dr. Sajwaj's actions were in any manner directed towards retaliation or attempts to harass the Complainant for his protected activity. Rather, I find Dr. Sajwaj's assertion that he was trying to help the Complainant "to rectify a problem that was affecting his therapy" to be credible (Tr. 237). Although there may have been several requests made of the Complainant for medical releases, there is no demonstrated animus on the part of TVA's personnel so as to find retaliatory treatment as the reason for their actions. Accordingly, I find that the repeated requests made of the Complainant to sign the medical release did not amount to adverse actions in violation of the Act.

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In his testimony, the Complainant also discusses the fact that Dr. Sajwaj refused to shake his hand as he entered the room where the April 12, 1990 meeting was held (Tr. 31). Dr. Sajwaj stated that he does not shake an employee's hand because he does not want to mislead the individual into thinking that he [Dr. Sajwaj] is acting as the employee's psychologist. Dr. Sajwaj stated that his first allegiance is to TVA and his role is explained to the employee at the first meeting (Tr. 225). As to the alleged statement that Dr. Sajwaj told Mr. House that he had met every psychologist in the valley, Dr. Sajwaj could not remember the exact words but said it was apparent from the record that Mr. House had met a number of different psychologists in the past, everyone on his staff, and that it was not said in an accusatory or demeaning fashion (Tr. 226).

Mr. Frye, a temporary supervisor, accompanied Mr. House to the medical office and referred to the Complainant as "old craze." The nurse, Ms. Mann, ignored the remark at the time and later reported it to Mr. Frye's general foreman, Mr. Edwards, who indicated that he would chastise Mr. Frye for making such a comment (Tr. 108-109). Finally, there was an incident while the Complainant was on leave from TVA in which he returned to

discuss his benefits and a physician refused to allow him to wait in the outer area of the medical office (Tr. 102-103).

Analysis

I find that these incidents, either individually or collectively, do not demonstrate "an abusive work environment" sufficiently to find an adverse situation representing a hostile work environment. *Meritor, supra*. It cannot be determined from the record whether the one name-calling incident was made as an attempt at humor but, in any event, there is no showing of bad faith. There is no indication of animus or bad faith on the part of any of the other alleged acts of harassment. In looking at the *prima facie* requirements of a hostile work environment, although he was a member of a "protected class," the Complainant has not shown that he was subject to "unwelcome harassment" or that the complained incidents were "harassment based upon his protected activity." *Rabidue, supra*; see, e.g., *Waltman v. Intern'l Paper Co.*, 875 F.2d 468 (5th. Cir. 1989) There is no evidence that any of these incidents were in retaliation for his filing of a complaint with the NRC or internally.

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The revocation of Complainant's security clearance complied with the operating procedures under TVA's policy and the nuclear regulations (JX 1). Moreover, the restrictions that were placed on the Complainant for returning to work were made by his personal psychiatrist, not TVA personnel (Tr. 225). The MMPI retesting was requested in order to facilitate Complainant's recertification for security clearance. The Complainant supplied no evidence that he objected to taking the test or no reasonable explanation for why he did not object. In addition, there is no evidence that Dr. Sajwaj or the other physicians who examined Complainant knew of the complaints so as to retaliate in their written reports or by other means. Reva Mann knew of the complaints after the investigation began but demonstrated no intent to harass Complainant in her requests for his signature on the medical releases. Dr. Sajwaj testified that the sole reason for these requests were to assist Complainant in resolving some concerns about his job (Tr. 237; JX 1). Finally, the assignment to the rigging room was done with Complainant's agreement and was intended to be temporary awaiting the renewal of Complainant's security clearance (Tr. 79-81). Therefore, as to the elements of a hostile work environment, I find that the Complainant has failed to carry his burden of proof to establish this adverse condition.

Accordingly, I find that the Complainant has failed to present a *prima facie* case of discriminatory treatment under Section 210 and his claim must fail.

IV. RECOMMENDED ORDER

IT IS ORDERED that the complaint of James E. House in Case No. 92-ERA-9 be DISMISSED.

ROBERT L. HILLYARD
Administrative Law Judge

[ENDNOTES]

¹ In this Decision, "ALJX" refers to the Administrative Law Judge's exhibits, "CX" refers to the Complainant's exhibits, "RX" refers to the Respondent's exhibits, "JX" refers to Joint exhibits and "Tr." refers to the transcript of the hearing.